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August 16, 2002

Ms. Joan Evans
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: D.T.E. 02-8

Dear Ms. Evans:

Enclosed, on behalf of AT&T, is an Affidavit of Anthony Fea. Mr. Fea's affidavit responds to the Affidavit of Lynelle Reney, which Verizon submitted to the Department on August 2, 2002. Ms. Reney's affidavit was attached to a Verizon motion that, among other things, asked for leave to submit Ms. Reney's affidavit.

I am aware that, on August 7, 2002, you issued a memorandum in which you declined to rule on Verizon's motion. Nevertheless, given Verizon's unorthodox procedural move of submitting Ms. Reney's affidavit before leave had been granted, AT&T believes that it is forced to address the factual errors in Ms. Reney's affidavit so as to avoid any prejudicial effect of Verizon's premature filing of Ms. Reney's affidavit. Unlike jury trial proceedings in which a judge may rule on these types of motions with the affidavit before her prior to submission of the evidence to the jury, in the present case the evidence has been submitted to the fact-finder before leave was granted to do so. The evidence, therefore, is known to the fact-finder when the decision is rendered, whether or not the evidence is part of the official record. In a situation, such as the present one, where the evidence has been submitted in an attempt to discredit opposing witnesses, it would be unfairly prejudicial to leave Verizon's evidence unrebutted. It is for this reason that AT&T files Mr. Fea's affidavit.[1]

[1] As a substantive matter, the issue that Verizon untimely seeks to raise is immaterial to the Department's decision. Even if it were true that AT&T had requested virtual collocation at a time when physical collocation was available in one central office in New England (a hypothetical that is demonstrably untrue as demonstrated by Mr. Fea's affidavit), such (would-be) evidence is hardly evidence that virtual collocation is an acceptable and competitively-neutral form of collocation. Evidence of one purportedly voluntary virtual collocation arrangement in New England (but not in Massachusetts) cannot offset the lack of virtual collocation among the many, countless other collocation arrangements AT&T maintains in New England, not to mention the detailed evidence AT&T provided as to why virtual collocation would undercut its ability to compete. The undisputed record evidence in this matter is that all CLECs over years of experience in Massachusetts operate physical collocations over 150 times more often than virtual collocation arrangements. Sprint Exhibit 1, at 7 (referencing information request Conversent 1-1a, attached thereto). No effort at obfuscation can or should detract from the weight of this overwhelming, unrefuted and uncontested evidence.

Verizon's disagreement with the response that it obtained to the question it asked by way of a record request (a disagreement that is baseless, as demonstrated by Mr. Fea's affidavit) does raise procedural issues regarding current Department practice that the Department may want to address at the appropriate time. Specifically, under current Department practice, a record request response is received as sworn testimony without being subject to cross examination. In other states, a hearing day is reserved after the submission of record request responses to allow for cross examination on them. While in theory it may be open to a party to request an opportunity to conduct such a cross examination under the Department's current practice, the unusualness of such a request would make it unlikely that it would be granted. Indeed, because the record is closed at the time the request must be made under current practice, a request to cross examine a witness regarding a record request response necessarily constitutes a request to reopen the record. As a result, under 220 CMR § 1.06(7)(b), a party seeking cross examination would have a burden of showing "good cause" to reopen the record. Thus, under the Department's current practice, instead of an ability to cross examine on an opposing party's sworn testimony as of right, parties must satisfy a potentially high threshold of "good cause."

If an opportunity to cross examine responses to record requests as of right had existed in the present case, Verizon would have been able to cross examine Mr. Fea on his record request response and would have discovered the facts as Mr. Fea laid them out in the affidavit enclosed herewith. Moreover, AT&T would have been entitled to redirect examination to ensure that the record was complete and accurate. Thus, the proper procedure for testing the accuracy of responses to record requests is cross examination. The "self-help" procedural device that Verizon sought to use here – an affidavit filed after the close of evidence – simply perpetuates the cycle of "testimony" filed after the close of hearings untested by cross examination, like the record request it purports to address.

In any event, in response to Verizon's premature filing of Mr. Reney's affidavit, AT&T submits to the Department Mr. Fea's affidavit in order to neutralize the prejudice Verizon has created by its unauthorized filing of Ms. Reney's affidavit.

Sincerely yours,

Jay E. Gruber

enclosure

cc: Mary Cottrell, Secretary
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